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March 7, 2023

Honorable Gina Raimondo
Secretary
Department of Commerce
1401 Constitution Avenue, NW
Washington DC, 20230

Honorable Katherine C. Tai
U.S. Trade Representative
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC 20508

Dear Secretary Raimondo and Ambassador Tai:

We are concerned about recent trends in antitrust enforcement by foreign countries against American companies and the threat these trends pose to comity and the stability of relations between the United States and our allies abroad.

The last year has seen a marked increase in U.S.-based companies doing business principally in the United States being mired in investigations and enforcement actions by foreign antitrust agencies, in many cases where the U.S. antitrust agencies determined the transactions passed competition muster, and in some cases did not even warrant investigation. Three stark examples from recent days underscore the urgency of these concerns:

In September 2022, the European Commission blocked U.S.-based Illumina's re-acquisition of its spinoff, U.S.-based Grail. Blocking this deal threatens to blunt U.S. leadership in innovation around multi-cancer early detection testing that lowers costs and facilitates equal and affordable access to such testing. While it's unclear whether Europe's aggressive action against the U.S. businesses may encourage similar action from the U.S. Federal Trade Commission (FTC), more clear is that the transaction poses little risk to competition in the U.S., as the FTC's own Administrative Law Judge held.[1] This represented the second time Illumina's acquisition of a U.S.-based company was blocked, wholesale, by a foreign competition agency, as the U.K. Competition and Markets Authority (CMA) in 2019 took the lead in stopping its acquisition of California-based PacBio, also rejecting any remedy short of a full block.[2]

[1] Administrative Law Judge Dismisses FTC's Challenge of Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail, Federal Trade Commission, Sept. 12, 2022, available at https://www.ftc.gov/news-events/news/press-releases/2022/09/administrative-law-judge-dismisses-ftcs-challenge-illuminas-proposed-acquisition-cancer-detection.

[2] The CMA's October 2019 Provisional Findings are available at https://assets.publishing.service.gov.uk/media/5db1b98a40f0b609ba817d38/Illumina_Pacbio_-_ProvFindings.pdf. Months later, the FTC followed the

The CMA order, imposed on October 18, 2022, compelled Meta to spin off its recent acquisition of GIPHY. Meta, a U.S.-based company, acquired GIPHY, a U.S.-based company with zero revenues in the U.K., in 2020. Within weeks of announcing the acquisition, the CMA imposed an interim enforcement order blocking Meta from integrating GIPHY with any of its platforms and requiring Meta to seek approval for product launches and personnel changes—heavy-handed processes unheard of under U.S. merger review. Meanwhile the U.S. antitrust agencies showed little interest in the deal and have taken no action. The CMA's investigation concluded that Meta likely acquired GIPHY because it was one of very few suppliers of gifs to its products and because it lacked a revenue strategy and was at risk of exiting the market, leaving little competition. The CMA investigation noted that no other entity came forward with interest to acquire GIPHY.

This means that Meta's acquisition would have maintained competition, while the U.K.'s order that a U.S. company divest another U.S. company with no real presence in the U.K. may very well leave *less* competition—in the U.S., the U.K., and globally—in the relevant market, while destroying the creation of consumer value by two U.S. companies.[3]

The CMA's conduct against mergers among U.S. companies has demonstrated a striking lack of good faith, due process,[4] or economic principle. For example, in the GIPHY case the U.K.'s Competition Appeal Tribunal (CAT) admonished the CMA for infringing Meta's rights of defense by improperly withholding relevant information, including the facts that (1) one of Meta's largest competitors, Snap, Inc., purchased Gfycat, a close competitor of GIPHY; and (2) Snap placed a very low valuation on GIPHY's business.[5] The CAT also criticized the CMA's theory that the deal had to be blocked because GIPHY was practically uniquely situated to become the next social media giant.[6]

CMA's lead, also challenging the deal. Case summary at https://www.ftc.gov/legal-library/browse/cases-proceedings/1910035-illumina-incpacific-biosciences-california-inc-matter.

[3] Even commentators and academics in the U.K. have concerns about the CMA's enforcement policies on the U.K.'s investment ecosystem and the competitiveness of the U.K.'s digital sector. See, e.g., Devin Reilly, D. Daniel Sokol, and David Toniatti, "Risk and Repeat: How the Venture Capital Ecosystem Drives Entrepreneurship and Innovation," Oxford Business Law Blog, Jan. 12, 2022, available at https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/01/risk-and-repeat-how-venture-capital-ecosystem-drives-entrepreneurship; Gary Dushnitsky, "Venture capital: an ecosystem under threat?," Think at London Business School, Nov. 24, 2021, available at https://www.london.edu/think/iepc-venture-capital-an-ecosystem-under-threat.

[4] Companies cannot challenge the merits of CMA rulings on appeal, but under a "judicial review" standard only ask whether the CMA acted irrationally or illegally.

[5] In addition to being unfair, the CMA's actions in this respect are in tension with the obligations that the United States has established in recent U.S. free trade agreements. *See, e.g.,* USMCA, Art. 21.2 (Procedural Fairness in Competition Law Enforcement).

[6] The CAT found that the CMA's selective disclosure was "difficult to defend and prima facie undermines the entirety of the Decision." 2022 CAT 26 at 88, 97, available at https://www.catribunal.org.uk/sites/default/files/2022-06/20220614_1429_Judgment_FINAL%20%5B2022%5D%20CAT%2026.pdf.

These cases illustrate a troubling trend of foreign jurisdictions using competition policy not to further the principles of free enterprise and market economies, but rather to achieve political and industrial policy goals, often at the expense of U.S. companies and broader U.S. interests. This includes policies such as the EU's Digital Markets Act, which departs from internationally established competition principles and targets only U.S.-based tech firms, as the Biden Administration has recognized.[7] Making matters worse, these interventions may be inflicting undue influence on U.S. agencies, who have expressed concerns about being perceived as falling behind their foreign counterparts,[8] while companies legitimately worry that U.S. leadership in merger policy is being ceded to jurisdictions with restrictive policies tailored against U.S. innovation and competitiveness.[9]

In light of the foregoing, we believe USTR and Commerce should explore all available tools to deter foreign governments from pursuing policies or actions that target, on spurious grounds, U.S. businesses in industries where the United States is a global leader. For example, such actions may merit investigation under Section 301 of the Trade Act of 1974, which authorizes the Office of the U.S. Trade Representative to investigate foreign government measures that are "unjustifiable" or "unreasonable" and "burden or restrict U.S. commerce." We further request that you assess whether USTR or Commerce can address such practices under existing authority, or if additional authority may be needed to ensure American economic sovereignty and security.

Sincerely,

Jeff Duncan
Member of Congress

Michael Guest
Member of Congress

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[7] *See, e.g.,* Aurelien Portuese, "Biden Administration Rightly Speaks Out on Europe's DMA," ITIF, Dec. 13, 2021 (citing U.S. Secretary of Commerce Gina Raimondo's statement that the Biden Administration has "serious concerns" that the Digital Markets Act "will disproportionately impact U.S.-based tech firms and their ability to adequately serve EU customers and uphold security and privacy standards"), available at https://itif.org/publications/2021/12/13/biden-administration-rightly-speaks-out-europes-dma/.

[8] Lina Khan, Cristina Caffarra, Rupprecht Podszun, Pierre Régibeau, Mike Walker, Lina Khan : US antitrust takes big steps – How to read that in Europe?, Feb. 2021, Concurrences N° 1-2021, Art. N° 98402, ("[T]he US has been behind the curve, especially with regards to the European Commission, with CMA."); Clara Hendrickson, "After years of lagging behind the international community, will the US begin to rein in 'big tech'?", Brookings, June 6, 2019, available at https://www.brookings.edu/blog/techtank/2019/06/06/after-years-of-lagging-behind-the-international-community-will-the-u-s-begin-to-rein-in-big-tech/.

[9] *See, e.g.*, U.K. and E.U. actions blocking transactions among U.S. companies such as the McGraw-Hill and Cengage merger, which posed a threat to the dominance of U.K.-based Pearson plc and the Sabre/Farelogix merger blocked by the CMA but cleared in the U.S. Jonathan Rubin and Timothy LaComb, "End of an Era: The U.S. is No Longer the Authority Figure for Multinational Mergers," National Law Review, May 19, 2020.